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No. _____

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In The

Supreme Court of the United States

October Term, 1989

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

THAIR HANNA SESI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

– AND APPENDICES –

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QUESTION PRESENTED

WHETHER THE FOURTH AMENDMENT BARS A WIFE FROM TENDERING TO THE POLICE COCAINE THAT SHE FOUND IN THE BEDROOM SHE SHARED WITH THE RESPONDENT IN THE MARITAL HOME?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INDEX TO AUTHORITIES CITED iv

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED .. 2

STATEMENT OF FACTS 3

REASONS FOR GRANTING THE WRIT 7

I. RESPONDENT'S WIFE WAS NOT ACTING AS A POLICE AGENT. 7

II. THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION TO SUPPRESS THE EVIDENCE. 16

CONCLUSION 20

APPENDICES:

Appendix A — July 19, 1989 ORDER DENYING APPLICATION FOR LEAVE TO APPEAL – Michigan Supreme Court A-1

Appendix B — January 9, 1989 OPINION – Michigan Court of Appeals B-1

Appendix C — June 1, 1988 ORDER – Michigan Court of Appeals C-1

Appendix D — May 10, 1988 ORDER DENYING MOTION TO SUPPRESS EVIDENCE – Oakland County Circuit Court .. D-1

Appendix E — March 16, 1987 SEARCH WARRANT AND AFFIDAVIT E-1

PAGE

Appendix F — April 25, 1988
EXCERPT OF PROCEEDINGS –
Oakland County Circuit Court
[*Court's Ruling on Respondent's Motion to Suppress*] F-1

INDEX TO AUTHORITIES CITED

CASES:

Burdeau v *McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 2d 1048 (1921) 2

Coolidge v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971) 2, 11

Fludd v *U.S. Secret Service*, 646 F Supp 185 (DDC, 1986) 19

People v *Burrell*, 417 Mich 439 (1983) 16

People v *Cosme*, 48 NYS2d 286; 397 NE2d 1319 (1979) 19

People v *Nash*, 418 Mich 196 (1983) 17

People v *Ragland*, 149 Mich App 277 (1986) 17

People v *White*, 401 Mich 482 (1977) 16

People v *Willey*, 103 Mich App 405 (1981); *lv den* 412 Mich 916 (1982); *cert den* 459 US 847 (1982) 11, 15

State v *Madrid*, 91 NM 375; 574 P2d 594 (1978) 19

Sullivan v *State*, 716 P2d 684 (Okl Cir, 1986) 19

United States v *Bazan*, 807 F2d 1200 (5th Cir, 1986) 13

PAGE

United States v *Coleman*, 628 F2d 961 (6th Cir, 1980) 2

United States v *Crowthers*, 669 F2d 635 (10th Cir, 1982) 19

United States v *Feffer*, 831 F2d 734 (7th Cir, 1987) 13

United States v *Ford*, 765 F2d 1088 (11th Cir, 1985) 12

United States v *Gumerlock*, 590 F2d 794 (9th Cir, 1979); *cert den* 441 US 948; 99 S Ct 2173; 60 L Ed 2d 1052 (1979) 12

United States v *Howard*, 752 F2d 220 (6th Cir, 1985); *cert den sub nom Shelton* v *United States*, 472 US 1029; 105 S Ct 3506; 87 L Ed 2d 636 (1985) 15

United States v *Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984) 8, 9, 16

United States v *Koenig*, 856 F2d 843 (7th Cir, 1988) 12

United States v *Lamar*, 545 F2d 488 (5th Cir, 1977); *reh den* 547 F2d 573 (1977); *cert den* 430 US 959; 97 S Ct 1609; 51 L Ed 2d 810 (1977); *reh den* 431 US 926; 97 S Ct 2203; 53 L Ed 2d 241 (1977) 15

United States v *Lambert*, 771 F2d 83 (6th Cir, 1985) 12, 13

United States v *Lamport*, 787 F2d 474 (10th Cir, 1986) 12

United States v *Lawless*, 465 F2d 422 (4th Cir, 1972) 19

PAGE

United States v *Long*, 524 F2d 660 (9th Cir, 1975) 18, 19

United States v *Matlock*, 415 US 164; 94 S Ct 988; 39 L Ed 2d 242 (1974) 2, 17, 18, 19

United States v *Miller*, 688 F2d 652 (9th Cir, 1982) 2, 14, 15

United States v *Ramirez*, 810 F2d 1338 (5th Cir, 1987) 12

United States v *Sherwin*, 539 F2d 1 (9th Cir, 1976) 12

United States v *Snowadzki*, 723 F2d 1427 (9th Cir, 1984) 12

United States v *Walther*, 652 F2d 788 (9th Cir, 1981) 2, 12

CONSTITUTIONAL AUTHORITIES:

US Constitution, Am IV 7, 11, 17

US Constitution, Am XIV, § 1 ..... 2, 11

Const 1963, art 1, § 11 ..... 11, 17

STATUTORY AUTHORITY:

MCLA 333.7401 3

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In The

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October Term, 1989

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

-vs-

THAIR HANNA SESI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court is in the form of an order denying leave to appeal filed July 19, 1989, and reported at __ Mich __ (1989). The decision of the Michigan Court of Appeals is dated January 9, 1989 and is an unpublished opinion (Michigan Court of Appeals docket number 108855). Copies of the order of the Michigan Supreme Court and the opinion of the Michigan Court of Appeals are included in the Appendix to this Petition.

JURISDICTION

The order of the Michigan Supreme Court was filed on July 19, 1989. The jurisdiction of this Court is invoked under 28 USC 1257(a). The decision of the Michigan Court of Appeals is based on the United States

Supreme Court cases, *Burdeau* v *McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 2d 1048 (1921), *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971), and *United States* v *Matlock*, 415 US 164; 94 S Ct 988; 39 L Ed 2d 242 (1974) and the decisions of *United States* v *Coleman*, 628 F2d 961 (6th Cir, 1980), *United States* v *Walther*, 652 F2d 788 (9th Cir, 1981), and *United States* v *Miller*, 688 F2d 652 (9th Cir, 1982).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which this Petition involves are:

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

Respondent is charged in the Oakland County Circuit Court with Possession of Over 225 Grams of Cocaine, contrary to MCLA 333.7401. Prior to trial he brought a motion to suppress the evidence obtained during a search of his home pursuant to a search warrant. A copy of the search warrant and supporting affidavit are included in the Appendix. (E-1) Following a two-day evidentiary hearing, the trial court denied Respondent's motion to suppress the cocaine. A copy of the court's order is included in the Appendix. (D-1) He then filed an interlocutory application for leave to appeal the denial of that motion. The trial court denied Respondent's motion for a stay. The Michigan Court of Appeals, however, granted Respondent's application by a 2-1 vote and stayed the proceedings below. A copy of the Michigan Court of Appeals' order is included in the Appendix. (C-1) The Court of Appeals reversed the decision of the trial court and suppressed the evidence. *People* v *Sesi*, Court of Appeals docket no. 108855 (unpublished opinion *rel'd* January 9, 1989), a copy of which is included in the Appendix. (B-1) The Michigan Supreme Court denied the prosecution's application for leave to appeal by a 4-3 vote. A copy of the order is included in the Appendix. (A-1) The prosecution now seeks a writ of certiorari.

Respondent and Susan Sesi were husband and wife at the time of this incident. (T I, 4-5) [1] They had been experiencing marital difficulties in the past and had begun divorce proceedings once before; they were in the

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[1] The suppression hearing was conducted over two days. The court ruled on the third. Volume I refers to that part of the hearing conducted on April 20, 1988; Volume II refers to April 22, 1988; Volume III to April 25, 1988. The portion of the transcript which contains the trial court's ruling is included in the Appendix. (F-1)

process of divorce again at the time of this incident. (T I, 26)

Susan Sesi moved out of the marital home at 27741 Dartmouth in the City of Madison Heights in February of 1987. (T I, 5) Her leaving the marital home was precipitated by another of the Respondent's violent fits against her. (T II, 23) He forced her out of the house and locked her out. (T II, 23) The Madison Heights police provided her with protection to allow her to gather some of her things; they also suggested that she not stay at the home. (T II, 24)

Over the next several weeks, Ms. Sesi was in contact with the Respondent on a number of occasions and he had even let her back in the house a few times. (T I, 32) She talked to Respondent again on March 15, 1987, about coming to pick up a few of her things still at the home, such as some personal clothing, her wedding ring, a personal savings account passbook, etc. (T I, 6-7) The Respondent said no and also told her not to come the next day because he would not be there. Ms. Sesi wanted her belongings but was afraid to go to the house alone due to Respondent's history of violence against her. (T I, 9) She called Dennis Corrigan, a Madison Heights police officer then assigned to the Oakland County Narcotics Enforcement Team (NET), to ask for his protection when she went to the house.

Ms. Sesi had been in contact with Officer Corrigan on a bi-weekly or so basis since she first made contact with him in October of 1986. (T II, 32, 45) She was referred to Officer Corrigan by the Madison Heights police department when she called to report that her husband, the Respondent, was selling large amounts of cocaine. (T I, 10) Ms. Sesi and Officer Corrigan arranged that if she knew her husband had just left the house with a quantity of cocaine, she would call NET, which

would then attempt to make a traffic stop of the Respondent. (T I, 11; T II, 33) Over the course of the few months that they were in contact, Ms. Sesi would sometimes call Officer Corrigan just to discuss her divorce and seek his advice. (T II, 34) She never met with Corrigan; all their conversations were by way of the telephone. (T II, 32) It does not appear from anything in the record that Respondent was ever stopped as the result of a tip provided by Ms. Sesi. In fact, Corrigan did not consider her an "informant." (T II, 55) She did not provide information on any investigation. (T II, 49) Her sole function was to call the NET unit in the event she became aware of the Respondent's being in possession of cocaine. Due to her contact with Officer Corrigan, she sought his assistance in returning to the marital home.

She called him on March 16, 1987, and told him that she wanted to retrieve certain personal items from the marital home. (T I, 8-9) It is uncontroverted that it was her idea to go to the house; no police officer told her to do so. (T I, 12) There was no mention of drugs by anyone. (T I, 12)

Corrigan arrived with another police officer in a marked police car and met with Ms. Sesi in a parking lot not far from the house. (T I, 12-13) Ms. Sesi was apologetic as she felt she was wasting the officers' time. (T I, 13) They drove in separate cars to the house. (T I, 13) The officers remained in their vehicle; Ms. Sesi approached the rear door of the house. (T I, 14) To her surprise, her key would not unlock the door; Respondent had had the locks changed. (T I, 15) She noticed that a pane of glass in the back door was missing — she reached inside, unlocked the door, and let herself in. (T I, 15) She was alone. (T I, 15)

Ms. Sesi went to the bedroom to collect her belongings. She had hidden certain things between the mattresses of her bed — they were gone. (T I, 19) So too was her clothing from the closet. (T I, 19) As she moved about the bedroom she tripped on a duffle bag lying on the floor. (T I, 19) She opened the bag to see if her things were inside; instead, she found several plastic bags of cocaine. (T I, 21)

She immediately went outside and told Officer Corrigan of her discovery. (T I, 21) They went to the prosecutor's office and a search warrant was prepared and then issued by the local district judge. (T II, 43-44) The cocaine was seized pursuant to the search warrant. (T II, 44)

Respondent moved to suppress the cocaine prior to trial. He argued that Ms. Sesi was a police agent and, thus, her initial foray into the marital home was illegal. Accordingly, Respondent seemed to argue, the search was tainted. He also maintained that she had no authority to consent to a search. The trial court commented that Ms. Sesi and the NET officers may have acted in concert, albeit without a common intent, but did not conclude that Ms. Sesi was a police agent. (T III, 29) The court went on to state that the search was valid inasmuch as Ms. Sesi was the wife and had every right of access to the marital home in the absence of any court order enjoining her from the premises. (T III, 30) The court noted that a search warrant was not even necessary. Ms. Sesi could have brought the cocaine out to the officers without one. (T III, 30) The search warrant, in any event, was valid, the court ruled; the motion to suppress was denied.

Respondent then filed an emergency interlocutory application for leave to appeal and a motion for stay. The Court of Appeals granted both requests and also

ordered the parties to address the issue of Ms. Sesi's role — whether or not she was acting as a police agent in her search of the bedroom. In its opinion, the Court of Appeals ruled that she was a police agent, had no right to enter the marital home without a search warrant, and thus the evidence was inadmissible by virtue of the Fourth Amendment. The Michigan Supreme Court declined to review the case.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals concluded that Respondent's wife was a police agent and thus was barred by the Fourth Amendment from tendering to the police cocaine that she inadvertently stumbled across in her bedroom after she entered the marital home to retrieve certain personal belongings. The Michigan Court of Appeals, however, did not analyze the "police agent" issue using the test developed by various of the federal circuits. Rather, the Court concluded that Ms. Sesi was an agent due to her previous contacts with the police. For the reasons set forth below, Ms. Sesi's conduct was not constitutionally objectionable nor was the cocaine obtained in violation of the Fourth Amendment.

I.

RESPONDENT'S WIFE WAS NOT ACTING AS A POLICE AGENT.

By order of the Michigan Court of Appeals, the parties were directed to brief the issue of whether Ms. Sesi was acting as a police or government agent when she "searched" the bedroom she shared with Respondent. The trial court did not conclude that she was a police agent although it commented that her behavior fitted

closely to being characterized as acting in concert with the police. (T III, 29-30) Yet, Ms. Sesi's actions do not constitute a "search" in the sense of constitutional law. "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v *Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984) (footnote omitted). It is not reasonable to expect privacy from one's own spouse in the bedroom of the marital home. As the trial court opined:

> The wife in this case had an absolute right to joint control and common authority over the premises, whether her husband had changed the locks or not, whether he had pushed her off the porch or not, whether he had sat her shoes out on the porch or not. She was his wife. *And there was absolutely no court interdiction that suggested that she had less than full rights of the occupancy and full rights of access to the entire interior premises of that house, regardless of her husband's attitude.*
>
> So that when she was in the house on the date in question, she had every absolute right to be there whether she had friends that were N.E.T. officers or not. It's nice that they went and got a search warrant, but in this Court's opinion, she could have carried the duffel bag out when she left and handed it to the officers. In this Court's opinion she was the defendant's wife with full rights, as I have said, of occupancy in these marital premises. And that's whether her name was on the lease or not.
>
> These parties were divorcing, but a Court responsible with jurisdiction over that partnership had not seen fit to restrict either party in their occupancy of those premises. Whether the

> husband was happy with her or not on the day in question in this Court's opinion is besides the point.
>
> (T III, 29-30; emphasis added; F-2)

Inasmuch as her right to be in the marital home and in the bedroom itself remained in full force, Respondent could not have a reasonable expectation of privacy from his wife in their own bedroom. Where there is no reasonable expectation of privacy, there can be no infringement of that reasonable expectation. Accordingly, there was no search. *Jacobsen, supra,* at 94.

As noted in the italicized portion of the trial court's findings (above), there was no court order or injunction barring the wife from the marital home. Respondent had not moved to a new residence. He was still living in the marital residence and was still legally married to his wife. There was no lawfully cognizable bar to the wife's entry into the marital home during the pendency of their marriage. That is precisely what the trial court held in the instant case when it ruled the evidence admissible.

The Michigan Court of Appeals, however, saw this case in a different light. To the Court of Appeals, the question was not the right of the wife to enter the marital premises. Rather, the Court stated, "We think the proper question is whether [the wife's] search was invalid because she was acting as a police or government agent when she searched the house." *People* v *Sesi,* Court of Appeals No. 108855, slip opinion, *rel'd* January 9, 1989, p 3. (B-3) Thus, the Court of Appeals shifted the analysis of this case from Ms. Sesi's relationship with her husband and the property to her relationship with certain police officers. In so doing, the Court ignored the true focus of search and seizure questions —

the expectation of privacy — and instead concentrated on extraneous matters.

The Court's approach makes little sense. It is not the Ms. Sesi/other person relationship that has any relevance in this case but, rather, the Ms. Sesi/Mr. Sesi/house relationship that is at issue. Taking the Court's opinion to its logical conclusion will have wholly illogical results. Using the Court's analysis, if the wife were an actual police officer, and not just an "agent" as they characterized her, the Court of Appeals, it would seem, would require her to get a search warrant to enter the home, or to get a pan from the kitchen cabinet, or to put her husband's socks in his drawer!

The Court of Appeals noted in its opinion that Ms. Sesi did not have to enter the home to retrieve the items of personalty she sought — "she could have obtained a court order for the[ir] return." Slip opinion, p 5. (B-5) Although she "could have" sought judicial intervention to recover her personal property, she did not "have to" — because she was not legally barred from entering the marital premises, she had every right to use "self-help." She committed no crime by entering the marital residence — after all, it was still her home, too. The Court of Appeals, however, chose to ignore the wife's *right* to be at the marital home.

Because there was no legal impediment to the wife's entry into the marital residence, her presence was lawful. Because a husband cannot reasonably expect privacy from his own wife in the marital bedroom, there can be no infringement of that "expectation." There being no unlawful activity and no reasonable expectation of privacy, there was no search. The trial court properly denied the Respondent's motion to suppress the evidence; the Court of Appeals erred in reversing the trial court's decision. This Court should

reverse the Court of Appeals, reinstate the decision of the trial court and allow this case to proceed to trial.

Assuming, *arguendo*, there was a search in the constitutional sense, the *sine qua non* of a violation of the guarantees against unreasonable searches and seizures contained in the federal and Michigan constitutions is that the search be conducted by the government. The Fourth Amendment protection is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as a government agent. *Id.* So too is the protection of the Michigan constitution unavailable where the complained-of activity was conducted by private parties. *People* v *Willey*, 103 Mich App 405 (1981); *lv den* 412 Mich 916 (1982); *cert den* 459 US 847 (1982). Of course, if the "private party" were an agent of the government, he would no longer be a private party and the protections of the respective constitutions would come into play. It thus becomes imperative to determine just what an "agent of the government" is. The Court of Appeals erred in finding the wife a police agent without analyzing the matter any further.

The question is whether Ms. Sesi "must be regarded as having acted as an 'instrument' or agent of the state" when she entered the bedroom of her marital home. *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971); *reh den* 404 US 874; 92 S Ct 26; 30 L Ed 2d 120 (1971). The Court merely stated the test without explaining it, but noted that there is nothing constitutionally suspect in actively co-operating with the police. 403 US at 488. Likewise, the policy underlying the Fourth and Fourteenth Amendments is not meant "to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.*

A certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state. *United States* v *Walther*, 652 F2d 788 (9th Cir, 1981). The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before that citizen can be deemed a government agent. *Id*, at 791; *United States* v *Gumerlock*, 590 F2d 794 (9th Cir, 1979) (en banc); *cert den* 441 US 948; 99 S Ct 2173; 60 L Ed 2d 1052 (1979). The requisite degree of governmental participation involves some degree of knowledge of and acquiescence in the search. *Walther, supra*, at 792; *United States* v *Sherwin*, 539 F2d 1, 6 (9th Cir, 1976) (en banc). The presence of law enforcement officers who do not actively encourage or assist an otherwise private search is similarly insufficient to invoke Fourth Amendment protections. *Walther*, at 792. Two of the critical factors in the government agent analysis are: (1) the government's knowledge and acquiescence and (2) the intent of the party performing the search. *Id.*

The various circuit courts of appeal have been applying the government agent test and none seems to require the result reached by the Michigan Court of Appeals in the case at bar. *See e.g., United States* v *Ramirez*, 810 F2d 1338 (5th Cir, 1987); *United States* v *Lambert*, 771 F2d 83 (6th Cir, 1985); *United States* v *Koenig*, 856 F2d 843 (7th Cir, 1988); *United States* v *Snowadzki*, 723 F2d 1427 (9th Cir, 1984); *United States* v *Lamport*, 787 F2d 474 (10th Cir, 1986); *United States* v *Ford*, 765 F2d 1088 (11th Cir, 1985). The test consists of two parts: (1) whether the government knew of and acquiesced in the searchers' conduct and (2) whether the searcher solely intended to assist law enforcement efforts or to further his own ends. *See e.g., Koenig, supra*, at 847. The mere fact that Ms. Sesi may have

become friends with Corrigan over the course of time to the extent that she would talk to him about her personal problems does not in and of itself render her a government agent. *See United States* v *Bazan*, 807 F2d 1200, 1203 (5th Cir, 1986). Rather, the critically distinguishing mark of a government agent is the purported agent's intent in conducting the search, i.e., whom does he serve: himself or "Big Brother"?

In the case at bar, Ms. Sesi entered the marital home for the purpose of retrieving certain of her personal belongings. Although she may have ended up uncovering Respondent's cocaine, her purpose for being there was otherwise. Moreover, there is no hint, suggestion or evidence that she acted for a reward nor is it argued that the police requested her to enter the premises to search for cocaine. These factors militate in favor of finding that Ms. Sesi was *not* a police agent. *United States* v *Feffer*, 831 F2d 734, 739-740 (7th Cir, 1987). A private citizen is not spontaneously transmuted into a police agent merely by conducting a search if that citizen's search is conducted for reasons other than solely intending to assist the police in their investigation. *See Lambert, supra*, at 89. Inasmuch as Ms. Sesi had her own independent reasons for entering the marital home and that her intent was to collect her possessions, *not* to ferret out her husband's on behalf of the police, she was not an agent.

The record is quite clear — drugs were never discussed until after their discovery by Ms. Sesi. No police officer suggested that she search for drugs or go to her home that day. (T I, 12) No police officer directed her to go into the home or to search for drugs. (T I, 18; T II, 34) She was on her own and merely called her friends at NET to afford her some protection from her maniacally violent husband. The full extent of the NET/Sesi

relationship was that Ms. Sesi was in contact with NET every two weeks or so. She never acted on their behalf or conducted any investigations on their behalf. At best she was a potential tipster who as yet had provided no tips. But it strains one's credulity to characterize her as a government agent by virtue of having made several fruitless phone calls to the police. To equate periodic telephone conversations with being a government agent is beyond even George Orwell.

Secondly, Ms. Sesi's intent was to retrieve her personal belongings — there was no thought of poking around for drugs. Even if undue emphasis is placed on Officer Corrigan's testimony to the effect that he recognized that it was possible Ms. Sesi might find drugs, it is clear that this faint hope existed in his mind and not hers. Ms. Sesi's testimony is clear in this regard — she went to the marital home to gather her belongings. The police were called for her own protection. Her intent was to retrieve personal items, not to search for drugs. The police intended to offer protection, not to search for drugs. Regardless of the possible hope by the police that drugs might be found, it is not their hope that is the focus of a search and seizure analysis. The police were not orchestrating the wife's acts in order to gain access to Respondent's home. The police may hope for whatever they want — as long as they take no overt action to bring that desire to fruition. There was no intent to search for cocaine.

Police accompaniment of a private citizen does not necessarily transform the private citizen's conduct into a government search or seizure. *United States* v *Miller*, 688 F2d 652, 658 (9th Cir, 1982). In *Miller*, the police escort of the victim of a larceny to the private property of an individual who later became the defendant so that the victim could photograph his stolen property

resting on that individual's land did not make the victim a government agent. The officer went along out of a concern for the victim's safety, not out of a desire to reap the benefits of a private search. *Id.* So, too, in the case at bar, Ms. Sesi called the police for protection. (T I, 40) That was Officer Corrigan's understanding, too — that he was there for her protection. (T II, 36) There was no intent to search for drugs or to reap the benefits of Ms. Sesi's search for her personal property. Corrigan remained in his car and did not accompany Ms. Sesi inside the house or even onto the property. This, too, highlights the private nature of Ms. Sesi's actions and vitiates any claim that she was acting under the ægis of the police. *See Miller, supra,* at 658.

The police officer was present but it is uncontroverted that he did not request that Ms. Sesi search for cocaine, nor did he participate in any manner in the search. When an officer did not request that a search be conducted and did not participate in the search, a private search conducted in the officer's presence does not violate the Fourth Amendment. *United States* v *Lamar,* 545 F2d 488 (5th Cir, 1977); *reh den* 547 F2d 573 (1977); *cert den* 430 US 959; 97 S Ct 1609; 51 L Ed 2d 810 (1977); *reh den* 431 US 926; 97 S Ct 2203; 53 L Ed 2d 241 (1977). Ms. Sesi was not a police agent by any definition. *See, too, United States* v *Howard,* 752 F2d 220 (6th Cir, 1985); *cert den sub nom Shelton* v *United States,* 472 US 1029; 105 S Ct 3506; 87 L Ed 2d 636 (1985).

Where the police neither encourage nor authorize a private citizen to seize evidence, that evidence may be used at trial whether or not the search was reasonable. *People* v *Willey, supra.* There is not one iota of evidence that the police encouraged or authorized Ms. Sesi to conduct a search for cocaine. The idea to go to the house was hers; the police were not involved — they

were there for protection only. Ms. Sesi had every right to be at the marital premises notwithstanding her husband's apparent wishes to the contrary. The use by a police of the information freely obtained by a private citizen did not violate the Fourth Amendment. *United States* v *Jacobsen, supra,* at 98. Ms. Sesi was not ever nor did she act on March 16, 1987, as a police agent. There was no violation of the Fourth Amendment.

II.

THE TRIAL COURT PROPERLY DENIED RESPONDENT'S MOTION TO SUPPRESS THE EVIDENCE.

The seizure of the cocaine in this case was entirely lawful and proper. A detached and neutral magistrate reviewed the affidavit supporting the search warrant and found that there was probable cause for the warrant to issue. The trial court properly denied Respondent's motion to suppress the evidence.

An appellate court will not disturb a trial court's ruling at a suppression hearing unless that ruling is found to be clearly erroneous. *People* v *Burrell,* 417 Mich 439, 448 (1983). If, upon review of the record, the appellate court does not possess a definite and firm belief that the trial court made a mistake, the decision of the trial court must be affirmed. *Id; People* v *White,* 401 Mich 482 (1977). In the case at bar, the Court of Appeals did not rule that the trial court's findings were clearly erroneous. The Court agreed with the trial court's factual findings but ignored its legal analysis. There being no appellate finding of clear error, the decision of the trial court should have been affirmed.

It is well-known that the proscriptions concerning searches and seizures apply to the government and not to private individuals. *United States* v *Jacobsen, supra.*

Both the federal and state constitutions provide guarantees against unreasonable searches and seizures. U.S. Const, Am IV; Const 1963, art 1, § 11. The standard of reasonableness imposed by the United States Constitution and the Michigan Constitution is the same. *People* v *Nash*, 418 Mich 196 (1983); *People* v *Ragland*, 149 Mich App 277 (1986).

The analysis of the case at bar begins and ends with the search warrant. There was no warrantless search within the meaning of the Fourth Amendment or the Michigan Constitution. The evidence was lawfully seized pursuant to a valid search warrant. Respondent contends that his wife had no right to enter the marital home and thus her "unauthorized" entry and the subsequent discovery of contraband cannot form the basis of establishing probable cause to support a search warrant. This contention is without merit.

It is undisputed that the premises constituted the marital home. It is also undisputed that there were no injunctions, restraining orders, or court directives barring her from the premises. (T III, 27) Regardless of whose name the lease was in, the wife's right to enter the marital home, to be at the marital home, and even to look about the marital home, continued unabated. Ms. Sesi was lawfully in a place she had a right to be in. Her conduct is not covered by the search and seizure provisions of the respective constitutions.

However, even assuming that her past contacts with the police (in an attempt to assist them to catch her husband in possession of the usual large quantities of cocaine he dealt in) made her a quasi-agent, the search was valid. Regardless of her association with NET, she had full authority to "consent" to a search — even one conducted by herself, as it were. In *United States* v *Matlock*, 415 US 164; 97 S Ct 988; 39 L Ed 2d 242 (1974),

the United States Supreme Court held that a warrantless search is not unconstitutional if permission for the search was obtained from a third party "who possessed common authority over or other sufficient relationship to the premises or effects to be inspected." *Id,* 171. The Court explained that this "common authority" is not based on property law theories but, rather, depends on

> . . . mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.
>
> *Id* at 171, n 7.

Each case must be looked at on its own facts.

In a remarkably similar situation, the Ninth Circuit Court of Appeals held such a search permissible. *United States* v *Long,* 524 F2d 660 (9th Cir, 1975). In *Long,* the defendant's wife feared for her safety as the defendant began amassing firearms and ammunition. The wife went to the FBI, who accompanied her back to the house and, with her consent, searched the house as she retrieved various personal items. The wife's keys no longer fit the locks of the door, so access was gained by removing a window in an adjacent storage building. Based on the items discovered and some basic investigation, a search warrant was issued. The wife returned with the FBI agents, who searched the house pursuant to the warrant, while she retrieved more of her personal possessions. The defendant challenged the search because he had not consented to it and his wife was

without authority to do so by virtue of her having left. The Court denied defendant's motion. *Id*, at 661.

In the case at bar, the wife similarly left out of fear and returned under police accompaniment to retrieve personal items. Assuming *arguendo* that Ms. Sesi expected to find drugs on the premises, so too did the defendant's wife in *Long* expect to find the very contraband that led her to the FBI in the first place. The quintessential factor in these cases is that even if the wives had left the homes and even if the husbands had changed the locks, the wives still had a *right* to be there and, thus, any consent is valid. *Long*; *Matlock*. In fact, the case at bar is even more compelling — the officers never entered the home until after a search warrant was obtained. In *Long*, the officers accompanied the wife inside and an actual "search" was conducted. In the case at bar, only the wife entered and no police search was conducted. *Long* clearly applies; the search warrant was properly issued. See *United States* v *Crowthers*, 669 F2d 635 (10th Cir, 1982); *United States* v *Lawless*, 465 F2d 422 (4th Cir, 1972); *Fludd* v *U.S. Secret Service*, 646 F Supp 185 (DDC, 1986). *See, too*, *Sullivan* v *State*, 716 P2d 684 (Okl Cr, 1986); *State* v *Madrid*, 91 NM 375; 574 P2d 594 (1978); *People* v *Cosme*, 48 NYS2d 286; 397 NE2d 1319 (1979).

These decisions fall in line with Michigan policy. A marriage does not end because a husband says so, nor is a wife's right of access to the marital home cut off at his whim and caprice. Regardless of Respondent's exhibited intent to keep his wife out of the marital home, she was within her lawful rights to be there. As such, it was within her power to enter the premises and search wherever and for whatever she chose.

CONCLUSION

WHEREFORE, Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Paul J. Fischer, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to grant this Petition for a Writ of Certiorari to review the judgments of the Michigan Supreme Court and Michigan Court of Appeals, or, in the alternative, to grant summary reversal of those decisions.

Respectfully submitted,

RICHARD THOMPSON
PROSECUTING ATTORNEY
OAKLAND COUNTY

ROBERT C. WILLIAMS
CHIEF, APPELLATE DIVISION

By: /s/ PAUL J. FISCHER (P35454)
Assistant Prosecuting Attorney
Counsel of Record
1200 North Telegraph Road
Pontiac, Michigan 48053
(313) 858-0771

DATED: August 25, 1988

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered July 19, 1989)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v THAIR HANNA SESI, Defendant-Appellee — SC: 85259; COA: 108855; LC: 87-078553-FH)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Brickley, Boyle & Griffin, JJ., would grant leave to appeal.

(*Certification Omitted*)

APPENDIX B

OPINION

(State of Michigan — Court of Appeals)

(Filed January 9, 1989)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v THAIR HANNA SESI, Defendant-Appellant — NO. 108855)

Before: Kelly, P.J., and MacKenzie and S. Miller,* JJ.

PER CURIAM

Defendant was charged with possession of over 225 grams of cocaine, MCL 333.7401; MSA 14.15(7401). The cocaine was seized by police during a search of defendant's residence pursuant to a search warrant. Prior to trial, defendant brought a motion to suppress the cocaine as evidence. He appeals by leave granted from an order denying the motion. We reverse.

The seizure of the cocaine was based on information supplied by defendant's estranged wife, Susan. Defendant and Susan had a history of marital discord, and in December 1985 defendant filed for divorce. A custody battle ensued, but both defendant and Susan remained in the marital home.

In October 1986, Susan contacted the Madison Heights police with information that defendant was selling cocaine from their home. The police department referred Susan to the Oakland County Narcotics Enforcement Team (NET), which assigned police officer Dennis Corrigan to work with her. After Susan informed Corrigan that her husband dealt narcotics from

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* Circuit Judge, sitting on the Court of Appeals by assignment.

a duffel bag, Corrigan instructed Susan to call whenever defendant left the house with the duffel bag. Corrigan considered defendant a "target", and planned to try to arrest defendant at a traffic stop. In the ensuing months, Susan contacted Corrigan approximately every other week.

Defendant forced Susan to move out of the marital residence in late January 1987. In February 1987, she admitted a DEA agent into the house to confirm the presence of cocaine. On March 16, 1987, Susan wanted to enter the marital home to see her son and to get some personal property. She testified that she was afraid that defendant might come home so asked Corrigan to accompany her. Corrigan and a plainclothes NET officer went to the house in an unmarked car, backed up by a uniformed police officer in a marked car. Corrigan declined Susan's invitation to enter the house. Susan then left her coat and purse in the car so the police would not think she placed something inside.

Defendant had changed the locks on the house, but Susan was able to reach through a broken window in the back door to gain entry. In the bedroom, while looking for her property, she stumbled over one of the duffel bags defendant used in his cocaine dealings. Susan opened it and discovered a fast food bag containing cocaine. She left the cocaine where it was and then left the house. After she told Corrigan that there was "a lot" of cocaine in the house, the police obtained a search warrant, entered the house, and seized the cocaine.

At the suppression hearing, defendant contended that the seizure of the cocaine was the fruit of an illegal search because defendant's wife did not have authority to consent to her initial search of the home. The trial judge opined that defendant's wife was used by the

police in a "thinly veiled attempt to make the scene that occurred at that time appear to be a domestic dispute", but nevertheless ruled the search and seizure reasonable because "the wife in this case had an absolute right to joint control and common authority over the premises . . . . She was the defendant's wife with full rights, as I have said, of occupancy in these marital premises."

On appeal, defendant again contends that his estranged wife lacked authority to consent to the search of the bedroom and duffel bag, and that the cocaine subsequently seized pursuant to the search warrant must be suppressed as the fruit of that initial, tainted search. See *United States* v *Matlock*, 415 US 164; 94 S Ct 988; 39 L Ed 2d 242, n 7 (1974). On these facts, we do not think that the applicability of the *Matlock* rule is the controlling issue. It overlooks the fact that defendant's wife did not consent to a police search of defendant's house — she conducted the search, and the police did not enter the home until they obtained a warrant based on her search. We think the proper question is whether Susan's search was invalid because she was acting as a police or government agent when she searched the house.

The Supreme Court acknowledged in *Burdeau* v *McDowell*, 256 US 465; 41 S Ct 574; 65 L Ed 1048 (1921) that the Fourth Amendment proscribes only governmental action, and does not apply to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official. *United States* v *Coleman*, 628 F2d 961, 964-965 (6th Cir. 1980). See also *Coolidge* v *New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971). There are two critical factors in deciding whether a

private citizen is an instrument or agent of the government: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. *United States* v *Walter*, 652 F2d 788, 792 (CA 9, 1981); *United States* v *Miller*, 688 F2d 652, 657 (9th Cir 1982).

In *People* v *Willey*, 103 Mich App 405; 303 NW2d 217 (1981), lv den 412 Mich 916 (1982), cert den 459 US 847; 103 S Ct 104; 74 L Ed 2d 93 (1982), relatives of a deceased person were cleaning the house previously occupied by the deceased and the defendant when they discovered defendant's diaries containing incriminating statements. They turned the diaries over to the prosecutor. We held that there was no unreasonable search and seizure because there was no governmental action. "Where the police neither encourage nor authorize a private citizen to seize evidence, that evidence may be used in a trial whether or not the search was unreasonable". 103 Mich App at 407. Similarly, in *People* v *DeLeon*, 103 Mich App 225; 303 NW2d 447 (1981), lv den 412 Mich 935 (1982), defendant's cellmate intercepted letters to the defendant's friends encouraging them to support a false alibi defense. The cellmate turned the letters over to the authorities. There was no unreasonable search in that case because "there is no contention or evidence that the police encouraged or authorized the action of defendant's cellmate. The cellmate acted on his own initiative and not under 'color of law'." 103 Mich App at 228. In *People* v *Langley*, 63 Mich App 339; 234 NW2d 513 (1975), a murder victim's brother found a bloodstained blouse in deceased's house and gave it to the police. There was no unreasonable seizure in that case either, because "the police did not encourage the brother to seize it." 63 Mich App at 344. In *People* v *Harry James Smith*, 31

Mich App 366; 188 NW2d 16 (1971), marijuana was seized from the defendant by a private security guard. This Court held that the seizure was proper because the guard did not act as a police officer or under authority of any police agency. It was therefore a search by a private individual. 31 Mich App at 373. See also, Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual,* 36 ALR3d 553.

In this case, there is strong evidence that defendant's wife was acting as a police agent when she searched defendant's bedroom. She had been reporting to Officer Corrigan for months about defendant's cocaine dealings. Corrigan considered defendant a "target" from the very beginning. Defendant's wife at one time allowed a DEA agent to come to the house and test cocaine found there. On the day of the search, she ostensibly called Corrigan for protection while she moved some of her personal effects from the house, although domestic matters are not within the narcotics enforcement team's jurisdiction and the couple's divorce hearing (where she could have obtained a court order for the return of her property) was to take place in three days. Further, although defendant's wife denied that she was instructed to do so by the police, she left her coat and purse in the car before going into the house to demonstrate that she had not carried anything into the house — a sophisticated precaution for a non-agent to take. Finally, the police manpower employed to assist defendant's wife is significant. Corrigan was backed up by one plainclothes NET officer and at least one uniformed Madison Heights police officer. In addition, the NET unit was on the alert in the area and arrived on the scene in one to two minutes after defendant's wife's search.

Where there has been affirmative participation by government officials in obtaining evidence, the police

cannot avoid the constitutional limitations imposed upon them by claiming that the acts of a private party are also involved. *People* v *Wagner,* 114 Mich App 541; 320 NW2d 251 (1982). Because Susan Sesi was an agent of the police, she was obligated to observe the defendant's constitutional right against unreasonable searches and seizures.

A search conducted without a warrant is unreasonable unless there exists both probable cause and an exigent circumstance establishing an exception to the warrant requirement. *People* v *Anthony,* 120 Mich App 207, 210; 326 NW2d 451 (1982), lv den 417 Mich 897 (1983), cert den 462 US 1111; 103 S Ct 2463; 77 L Ed 2d 1340 (1983). Here, defendant's wife did not have a warrant when she entered defendant's residence. Clearly, she did not have probable cause to support a warrantless search; she had not lived in the house for approximately six weeks and could not know whether cocaine was present. Nor did exigent circumstances exist. See *People* v *Raybon,* 125 Mich App 295, 301; 336 NW2d 782 (1983), *People* v *Castle,* 126 Mich App 203, 208; 337 NW2d 48 (1983), lv den 419 Mich 876 (1984). The state correctly contends that a warrantless search is not unconstitutional if permission for the search was obtained from a third party "who possessed common authority over or other sufficient relationship to the premises or effects to be inspected", *Matlock, supra.* Defendant's wife, as an instrument of NET, does not constitute a third party within the meaning of *Matlock,* however.

In sum, defendant's wife, as a police agent, needed a warrant to search defendant's residence. The absence of a warrant rendered her search unlawful. Because the cocaine in this case was obtained as a direct result of

the unconstitutional search accomplished by defendant's wife, it should have been suppressed as evidence.

Reversed.

/s/ Michael J. Kelly
/s/ Barbara B. MacKenzie
/s/ Stephen B. Miller

APPENDIX C

ORDER

(State of Michigan — Court of Appeals)

(Certified June 1, 1988)

(People v Thair Hanna Sesi — Docket # 108855; L.C. # 87 78553 FH)

Martin M. Doctoroff, Presiding Judge;
William R. Beasley, John H. Shepherd, Judges.

The Court orders that the application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(D)(3). The parties are directed to brief the question, *inter alia*, whether Mrs. Sesi was acting as a police or government agent when she searched the bedroom.

The stay of proceedings granted by this Court remains in effect pending appeal.

Judge Beasley would Deny application for leave and Dissolve stay.

(SEAL) A true copy entered and certified by Ronald L. Dzierbicki, Chief Clerk, on

June 1, 1988 — Date

Ronald L. Dzierbicki — Chief Clerk

APPENDIX C

ORDER DENYING MOTION TO SUPPRESS EVIDENCE

(State of Michigan – Circuit Court – County of Oakland)

(Filed May 10, 1988)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, -vs- THAIR HANNA SESI, Defendant — CASE NO. 87-78553FH; HON. JOHN O'BRIEN)

At a session of said court held in the Oakland County Court House on May 10, 1988.

PRESENT: JOHN N. O'BRIEN,
Circuit Judge.

IT IS HEREBY ORDERED that the Defendant's motion to suppress evidence is hereby DENIED.

/s/ JOHN N. O'BRIEN
Circuit Judge

/s/ DOUGLAS J. WARTELL
/s/ JIM HLUSKA [*sic*, HALUSHKA]

(*Certification Omitted*)

APPENDIX E

SEARCH WARRANT AND AFFIDAVIT

(State of Michigan — 43rd District Court — County of Oakland)

(Issued March 16, 1987)

STATE OF MICHIGAN
COUNTY OF OAKLAND – ss

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY:

THE ATTACHED AFFIDAVIT having been sworn to by the affiant, Officer Dennis Corrigan, before me this day, based upon the facts stated therein, probable cause having been found, in the name of the People of the State of Michigan I command that you enter the following described place:

> The closet and compartments of the first floor bedroom located in the southeast corner of a home located at 27741 Dartmouth, City of Madison Heights, County of Oakland, State of Michigan, said residence being a two story, brown brick and white aluminum sided house located on the southwest corner of Dartmouth and Forest.

therein to search for, seize, secure, tabulate and make return according to law for the following property and things:

> Cocaine or any other controlled substances and any evidence of drug trafficing including but not limited to scales, packaging, money,

records of transactions and evidence of occupancy/ ownership.

ISSUED UNDER MY HAND this 16 day of March, 1987.

/s/ Robert J. Turner
District Judge in and for
the 43rd District Court,
County of Oakland, State of Michigan.

AFFIDAVIT FOR SEARCH WARRANT

STATE OF MICHIGAN
COUNTY OF OAKLAND – ss

Officer Dennis Corrigan, affiant, being first duly sworn, on oath deposes and says:

(1) That the following property constitutes evidence of criminal conduct:

Cocaine or any other controlled substances and any evidence of drug trafficing including but not limited to scales, packaging, money, records of transactions and evidence of occupancy/ownership.

(2) Affiant further says that the above-mentioned property is located at the following described place:

The closet and compartments of the first floor bedroom located in the southeast corner of a home located at 27741 Dartmouth, City of Madison Heights, County of Oakland, State of Michigan, said residence being a two story brown brick and white aluminum sided house located on the southwest corner of Dartmouth and Forest.

(3) Affiant further says that he has probable cause to believe the above-listed property to be searched for and

seized is now located upon said described premises, based upon the following facts:

A. That he is an officer with the Madison Heights Police Department and presently is assigned to the Narcotics Enforcement Team (hereinafter NET).

B. That pursuant to his duties as a narcotics officer on 3/16/87 he spoke with Susan Sesi who indicates:

1. That she is the estranged wife of Thair Sesi who presently resides in the marital home at 27741 Dartmouth.

2. That although a divorce has been pending for almost a year, as recently as 3 weeks ago she was living at the marital home and she presently still has personal property there.

3. That on 3/16/87 she returned to 27741 Dartmouth to get her wedding ring, clothing, and other personal property and because she was fearful for her safety she requested and was provided with a marked patrol unit from Madison Heights Police Department to stand by as she entered the residence.

4. That she entered the first floor bedroom located in the southeast corner of the house to look for her personal property and she observed a brown duffle bag on the floor next to the bed.

5. That she looked inside the duffle bag and observed several pounds of a white powder.

6. That she believes the white powder to be Cocaine because during the course of her marriage to her husband Thair frequently sold Cocaine in the house.

C. That affiant believes Susan Sesi to be credible and the information furnished to be reliable in that he has had previous conversations with Susan Sesi after which he was able to corroborate the personal information provided. For instance, affiant has confirmed that the described location is the marital home, Thair Sesi has been identified as her husband and other personal information provided by the informant has been confirmed via outside sources.

D. That therefore affiant requests authority to search for and seize the described white powder as well as the other described evidence which would indicate drug trafficing.

/s/ Dennis M. Corrigan
Officer Dennis Corrigan, Affiant

Subscribed and sworn to before me
this 16 day of March, 1987.
/s/ Robert J. Turner
District Judge in and for
the 43rd District Court,
Oakland County, State of Michigan.

APPENDIX F

EXCERPT OF PROCEEDINGS

(State of Michigan – Circuit Court – County of Oakland)

(Proceedings of April 25, 1988)

(PEOPLE OF THE STATE OF MICHIGAN, -vs- THAIR HANNA SESI, Defendant — Case No. 87-78553-FH)

Proceedings had and testimony taken in the above-entitled cause before the HONORABLE JOHN O'BRIEN, Judge, Oakland County Circuit Court, Pontiac, Michigan, on Monday, April 25, 1988, at about 1:30 p.m.

APPEARANCES: JAMES HALUSHKA, ESQ., On behalf of the People; DOUGLAS J. WARTELL, ESQ., On behalf of the Defendant.

* * *

COURT'S RULING ON RESPONDENT'S MOTION TO DISMISS

(28) * * * THE COURT: Let me observe that this (29) whole March 16th scene between this witness/wife and the N.E.T. officers appears to this Court to have been at least in part a thinly veiled attempt to make the scene that occurred at that time appear to be a domestic dispute, when actually the wife was being utilized, should it turn out that she was available to be so utilized, as an agent of the investigative officers for their purposes concerning the narcotics investigation; which had been ongoing apparently for some time.

And there appears to this Court to have been an attempt to give us the appearance of something other than what it actually was.

Together — by together I mean the wife and the N.E.T. officers — orchestrated by accident or on purpose, although not with a common intent, I can't conclude that, but there was a joint motivation to create your playbill that would make a search look like maybe solely a domestic protection exercise only. But in my judgment it was at least both.

However, in this Court's opinion, it doesn't matter. The wife in this case had an absolute right to joint control and common authority over the premises, whether her husband had changed the locks or not, whether he had pushed her off the porch or not, whether he had sat her shoes out on the porch or not. She was his wife. (30) And there was absolutely no court interdiction that suggested that she had less than full rights of the occupancy and full rights of access to the entire interior premises of that house, regardless of her husband's attitude.

So that when she was in the house on the date in question, she had every absolute right to be there whether she had friends that were N.E.T. officers or not. It's nice that they went and got a search warrant, but in this Court's opinion, she could have carried the duffel bag out when she left and handed it to the officers.

In this Court's opinion she was the defendant's wife with full rights, as I have said, of occupancy in these marital premises. And that's whether her name was on the lease or not.

These parties were divorcing, but a Court responsible with jurisdiction over that partnership had not seen fit to restrict either party in their occupancy of those premises. Whether the husband was happy with her or not on the day in question in this Court's opinion is besides the point.

The motion to suppress the evidence seized as a result of the search warrant obtained as a result of the

wife's affidavit, provided as a result of her (32) [*sic*, (31)] entry into her own premises on March 16th, that motion is denied.

MR. HALUSHKA: Thank you, Your Honor.

MR. WARTELL: Thank you.

(At about 2:02 p.m. — whereupon proceedings concluded)